

RECD AUG 29 REC'D

Name: Matthew E. Jackson

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy on the First Judicial District Court

APPLICATION

PERSONAL

1. Full Name	Matthew Eric Jackson			
2. County of Residence	Santa Fe			
3. Birthplace	Albuquerque, NM			
4. If born outside the US, give the basis for your citizenship				
5. Birth Date	1973			
6. Marital Status	Single			
7. If married, list spouse's full name				
8. Spouse's occupation				
9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.				
Answer 9: No.				
10. List all places of residence, city and state, and approximate dates for the last 10 years				
Date(s) of Residence	Street Address	City	State	Zip
Oct. 2015–present	1968 Otowi Road	Santa Fe	NM	87505
June 2008–Oct. 2015	825 Calle Mejia #1101	Santa Fe	NM	87501
Aug. 2005–June 2008	2200 S. Pleasant Valley Road #1113	Austin	TX	78741

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)				
High School(s)	Portales High School, Portales New Mexico (Fall 1988–Spring 1991); Interlochen Arts Academy, Interlochen, MI (Fall 1991–Spring 1992): High School diploma			
College(s)	Southern Methodist University, Dallas, TX (Fall 1992–Spring 1996): B.Mus. (Piano Performance/Composition), with honors & with honors in the liberal arts University of North Texas, Denton, TX (Fall 1997–Spring 1998): graduate program in composition; left program before obtaining degree			
Law School(s)	University of Texas, Austin, TX (Fall 2005–Spring 2008), J.D., with honors			

12. Bar Admissions and Dates	New Mexico, 2008 District of New Mexico, 2009 Tenth Circuit, 2012
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EMPLOYMENT

13. List Your Present Employment

Date(s) of Employment	Feb. 2013–present
Employer	Peifer, Hanson & Mullins, P.A.
Mailing Address	Post Office Box 25245, Albuquerque, NM 87125
Business Phone	505-247-4800
Position	Associate
Duties	Litigation
Supervisor	All partners (see answer to No. 15.)

14. List Your Previous Employment (beginning with most recent)

Dates of Employment	June 2008–Jan. 2013
Employer	New Mexico Attorney General's Office
Mailing Address	408 Galisteo Street, Santa Fe, NM 87501
Business Phone	505-490-4060
Business FAX	505-490-4883
Position	Assistant Attorney General
Dates of Employment	Apr. 2007–Feb. 2008
Employer	PowerScore, Inc.
Mailing Address	37V New Orleans Road, Hilton Head Island, SC 29928 (corporate address—I taught classes in Austin, TX).
Business Phone	800-545-1750
Position	LSAT Instructor
Dates of Employment	June 2007–Aug. 2007
Employer	Brazil & Dunn
Mailing Address	4201 FM 1960 West, Ste. 530, Houston, TX 77068 (I worked remotely from Austin, TX).
Business Phone	281-580-6310
Position	Summer Clerk
Dates of Employment	June 2006–Aug. 2006
Employer	University of Texas School of Law
Mailing Address	727 East Dean Keeton Street
Business Phone	512-471-5151
Position	Research Assistant for Professors John Dzienkowski and Oren Bracha

Dates of Employment	Jan. 2017-Aug. 2001
Employer	Yahoo!, Inc. (formerly audionet.com/broadcast.com)
Mailing Address	701 First Avenue, Sunnyvale, CA 94089 (corporate address—I worked at the Dallas office).
Business Phone	408-349-3300
Position	Technical Yahoo!/Quality Control/OVERNIGHT Broadcast Tech
Dates of Employment	Fall 2006
Employer	Guitar Center, Inc.
Mailing Address	5795 Lindero Canyon Road, Westlake Village, CA 91362 (corporate address—the location I worked at in Dallas closed long ago).
Position	Keyboard sales
Dates of Employment	Fall 2006
Employer	Lincoln Staffing
Mailing Address	4323 Alpha Road, Dallas, TX 75244
Business Phone	214-369-7227
Position	Office temp
Dates of Employment	Summer/Fall 2006
Employer	Mailboxes, Etc.
Mailing Address	5600 W. Lovers Lane #116, Dallas, TX 75209
Business Phone	N/A (company acquired by UPS)
Business FAX	N/A
Position	Retail associate
Dates of Employment	Summer 2006
Employer	Starbucks
Mailing Address	6733 Hillcrest Ave, Dallas, TX 75205
Business Phone	214-691-4890
Position	Barista
Dates of Employment	Fall 1992 – Spring 1996
Employer	Southern Methodist University (Meadows School of the Arts
Mailing Address	Post Office Box 750356, Dallas, TX 75275-0356
Business Phone	214-768-4154
Position	Accompanist (work-study)
Dates of Employment	Summer 1995
Employer	City of University Park, TX
Mailing Address	3800 University Boulevard, University Park, TX 75205
Business Phone	214-363-1644
Position	Lifeguard

Dates of Employment	Summer 1995
Employer	Lakewood Country Club
Mailing Address	6430 Gaston Avenue, Dallas, TX 75214
Business Phone	214-821-1491
Position	Lifeguard
Dates of Employment	Summer 1991 – 1994
Employer	Portales City Swimming Pool
Mailing Address	320 East 7 th Street, Portales, NM
Business Phone	575-359-4805
Position	Lifeguard

Note: No. 14 is a separate table which enables you to copy and paste it as many times as necessary to list all previous employers.

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:

Answer 15: These are the partners for whom I work. I am an associate.

Partners:

Charles R. Peifer
 Robert E. Hanson
 Matthew R. Hoyt
 Lauren Keefe
 Mark T. Baker

Of Counsel:

Cerianne L. Mullins
 Gregory P. Williams

Associates:

Elizabeth K. Radosevich
 Carter B. Harrison IV
 Walker Boyd

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?

Answer 16: I have had experience with multiple personal injury cases, including wrongful death cases. I have represented both plaintiffs and defendants in cases arising out of personal injuries (including claims for indemnity).

17. How extensive is your experience in Commercial Law?

Answer 17: I have significant experience in commercial law, including complex commercial litigation, class actions and representations of institutional clients.

18. How extensive is your experience in Domestic Relations Law?

Answer 18: I have no experience with domestic relations law.

19. How extensive is your experience in Juvenile Law?

Answer 19: I have no experience with juvenile law.

20. How extensive is your experience in Criminal Law?

Answer 20: I have very little direct experience with criminal law. While at the Attorney General's Office, I helped prepare a colleague for an appellate argument regarding a DWI case and provided comments to a brief in another. And I represented judges in extraordinary writ proceedings arising out of criminal cases. In addition, as a former administrative prosecutor, I have experience with the effects that a criminal proceeding can have on parallel disciplinary proceedings.

21. How extensive is your experience in Appellate Law?

Answer 21: I have represented both private and government parties in New Mexico appellate courts, including original extraordinary writ proceedings in the New Mexico Supreme Court. I have argued multiple times before the New Mexico Supreme Court. I have also represented both private and government entities before the United States Court of Appeals for the Tenth Circuit.

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

Answer 22: I have tried no cases to a jury, but I recently attended a jury trial in a case in which our client is party to a bifurcated proceeding in the same case.

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

Answer 23: I have not tried any cases in court, but I have tried many administrative cases, including between 10 and 15 administrative prosecutions and one property tax appeal. The property tax appeal took place in the past two years.

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

Answer 24: Including original writ proceedings in the New Mexico Supreme Court and Rule 1-074 appeals to district courts from administrative agency decisions, I have handled over 20 appeals. Of these appeals, two have been decided since Jan. 1, 2015 (one was decided on July 9, 2015, which is slightly outside of two years from the date of this submission). One of these was in the Court of Appeals, and the other was a Rule 1-074 appeal in district court. In addition, I have a matter currently pending before the Court of Appeals.

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS**25. Public Offices Held and Dates**

Public Office	Dates
Assistant Attorney General (This is not an elected office, but I am including it out of an abundance of caution).	June 2008–Jan. 2013

26. Activities in professional organizations, including offices, held, for last 10 years		
Professional Organization	Position Held	Dates
Oliver Seth Inn of Court	Barrister	Sept. 2015–present
27. Activities in civic organizations, including offices, held, for last 10 years		
Civic Organization	Position Held	Dates
28. Avocational interests and hobbies		
Answer 28: Music, bicycling, skiing, chess, hiking		
29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.		
Answer 29: No.		
30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify		
Answer 30: No.		
31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.		
Answer 31: No.		
32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?		
Answer 32: No.		
33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?		
Answer 33: No.		
34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).		
Answer 34: No.		
35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?		
Answer 35: No.		
36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?		
Answer 36: N/A		

37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?

Answer 37: N/A

38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.

Answer 38: Yes.

39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.

Answer 39: No.

40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:

Answer 40: City Taverns, LP. This is an inactive Texas limited partnership, and I am a limited partner of this entity, which is a holding company for a failed restaurant in Dallas, Texas.

41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.

Answer 41: There is an attorney who practices in this judicial district that would present a danger of bias or prejudice under Rule 21-211(A)(1) NMRA due to a close lifelong friendship. In addition, although my current employer is based in Albuquerque, we regularly practice in this judicial district. I would disqualify myself from matters in which my current employer represents a litigant for a reasonable period of time. I have been out of government long enough that I do not anticipate any conflicts under Rule 21-211(A)(5)(b) NMRA

42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.

Answer 42: Yes. I am over thirty-five years old, I have been in the actual practice of law for nearly nine years, and I have resided within the First Judicial District for the entirety of that time.

43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.

Answer 43:

I am applying for a judicial position because I believe in public service. Litigants are entitled to an impartial, capable, courteous, and efficient judiciary, and I can help provide that service. I am well-suited for the bench because I can quickly and thoroughly analyze legal and factual issues and because I have an even temperament. I actively follow developments in the law, both in New Mexico and elsewhere, even if those developments are unrelated to my practice, because they interest me. At the same time, I understand that litigants do not necessarily share that interest; they want to resolve their disputes. If appointed, I will do my part in providing that resolution, and doing so, I will treat both litigants and counsel with the respect and understanding to which they are entitled. This entails not only courtesy in the courtroom, but taking the time to thoroughly prepare for the matters to be heard, so that counsel do not have to spend precious hearing time educating the judge on the content of their briefs. I recognize that with the size of the docket, this requires a significant—but necessary—time investment,

and I am eager to do that work. In short, I believe I have the capability, and I know I have the drive, to be an excellent judge.

44. Does submission of this application express your willingness to accept judicial appointment to the First Judicial District Court if your name is chosen by the Governor?

Answer 44: Yes.

Items to be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, **the original letters must be mailed directly from the source to the Judicial Selection Office.**
2. Please attach a list of no more than eight (8) references.
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.
5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/: Matthew E. Jackson Date: Aug. 29, 2017

WRITING SAMPLES FOR MATTHEW E. JACKSON

Attached are the following:

1. For my legal writing sample, I attach a reply brief, filed with the New Mexico Supreme Court, in support of a petition for mandamus in *Fort Sill Apache Tribe v. Martinez*, No. 34,464. Reply briefs are not normally permitted for these proceedings, but we sought and obtained leave to file this brief. I was the principal drafter of this brief, but it incorporates comments from Charles R. Peifer and Matthew R. Hoyt, partners at my firm.
2. As an additional publication, I attach an *Albuquerque Journal* article I wrote on a then-recent decision of the New Mexico Court of Appeals in *Rodriguez v. Brand West Dairy*, 2015-NMCA-097.

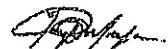
IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SUPREME COURT OF NEW MEXICO
FILED

FORT SILL APACHE TRIBE, and the
HONORABLE JEFF HAOZOUS, Chairman
of the Fort Sill Apache Tribe,

JAN 21 2014

Petitioners,



vs.

S. Ct. No. 34,464

THE HONORABLE SUSANA MARTINEZ,
in her official capacity as Governor of the
State of New Mexico, and ARTHUR ALLISON,
in his official capacity as Cabinet Secretary of
New Mexico Indian Affairs Department,

Respondents.

**REPLY IN SUPPORT OF
VERIFIED PETITION FOR WRIT OF MANDAMUS**

Charles R. Peifer
Matthew R. Hoyt
Matthew E. Jackson
PEIFER, HANSON & MULLINS, P.A.
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Albuquerque, NM 87125-5245
Tel: (505) 247-4800

None of the arguments offered by Respondents justify denial of the relief sought in the Petition. Respondents do not dispute the facts showing that the Tribe is federally-recognized and that, since 2011, it has had its sole reservation in New Mexico. Under the Act, that presence is sufficient to require Respondents to recognize the Tribe.

I. RESPONDENTS FAIL TO DISPUTE THAT THE FORT SILL APACHE TRIBE HAS ITS ONLY RESERVATION IN NEW MEXICO.

The Fort Sill Apache Reservation is in New Mexico. Respondents do not dispute that according to the federal Government, the Tribe's *only* Reservation is in Luna County. 76 Fed. Reg. 72969¹ (2011) ("This notice informs the public that the Assistant Secretary—Indian Affairs proclaimed approximately 30.00 acres, more or less, as the Fort Sill Apache Indian Reservation" and setting forth the description of the Reservation within Luna County, New Mexico) (emphasis added). According to BIA, the Fort Sill Apache Indian Reservation is in New Mexico.

The Fort Sill Apache Indian Reservation is not just some land in New Mexico that the Tribe happens to own. It is the Tribe's Reservation, recognition of which was hard-won only recently and after years of legal struggles. That the majority of the population of the Tribe has not yet returned to its aboriginal

¹ The Petition cited to the issue number, rather than the page number within the issue, for this Notice.

territory is not surprising, given Respondents' hostility and the relatively recent recognition of the Tribe's reservation in the area of its ancestral homeland.

Because Respondents do not dispute that the Fort Sill Apache Indian Reservation is in New Mexico, they cannot argue that the Tribe is not located at least partially in New Mexico.

II. RESPONDENTS IGNORE THE STATUTORY LANGUAGE REQUIRING RECOGNITION OF TRIBES "PARTIALLY LOCATED" IN NEW MEXICO.

While Respondents accurately quote the statutory language applying the State-Tribal Collaboration Act to "any federally recognized Indian nation, tribe or pueblo located wholly *or partially* in New Mexico," NMSA 1978, § 11-18-2(B) (emphasis added), they ignore the word "partially" in their application of the language. Respondents assert that what is controlling is "where the governmental entity is located, not where the tribe's lands are located." Resp. at 13. This is not only an inaccurate construction, as it inserts words into the statute; i.e., "governmental entity," but it is not even the construction Respondents use. The Navajo Nation has its seat of government in Window Rock, Arizona, yet Respondents include and recognize the Navajo Nation under the Act. Pet. at 22–23

and citations therein. Under the construction offered by Respondents, the Navajo Nation would not be recognized under the Act.²

Respondents also argue that the Fort Sill Apache Tribe is based in Oklahoma, because it has its government and the largest concentration of its members in Oklahoma. Resp. at 7. Respondents also argue that the federal government recognizes the Fort Sill Apache Tribe as being located in Oklahoma, based on a 2008 memorandum of the National Indian Gaming Commission (NIGC) and the Tribe's name in a list of recognized Tribal Entities. Resp. at 15–16. Neither of these controls.

A. The NIGC Memorandum Does Not Control.

The NIGC memorandum is not dispositive because it dealt with a different statutory scheme and a different issue, and because the federal government has since recognized the Tribe's Reservation in New Mexico.

² Because Respondent Allison does not adhere to the construction of the Act that he offers here, his interpretation of the Act should not be accorded any deference whatsoever. See *Atlixco Coalition v. Cnty. of Bernalillo*, 1999-NMCA-088, ¶ 26, 127 N.M. 549, 555, 984 P.2d 792 (adopting the reasoning that “a court should not defer if the agency . . . , rather than using its knowledge and expertise to discern the policies embodied in an enactment, decides on the basis of what it now believes to be the best policy.”) (quoting *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1994-NMCA-139, 119 N.M. 29, 888 P.2d 475; see also *Phelps Dodge Tyrone, Inc. v. N.M. WQCC*, 2006-NMCA-115, ¶ 11, 140 N.M. 464, 468, 143 P.3d 502 (“We give little or no deference to agencies engaged in statutory construction because they have no expertise in that area.”)).

The 2008 NIGC memorandum dealt with whether the Tribe's land in New Mexico fell within the "last recognized reservation exception" under IGRA, which permits gaming on lands acquired in trust after October 17, 1988 if "such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." NIGC Memorandum, <http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f051808ftsillapachelunaonmproperty.pdf&tabid=120&mid=957> (May 19, 2008), at 7. To determine where a tribe is "presently located" under the exception, the NIGC looks to the seat of tribal government and population center. *Id.* at 8. While NIGC acknowledges that under some circumstances, "a tribe may be 'presently located' in more than one state," *id.* at 11, it still looks for a "major governmental presence." *Id.* at 11. By contrast, the State-Tribal Collaboration Act looks only to whether a tribe is "wholly *or partially* located in New Mexico." NMSA 1978, § 11-18-2(B) (emphasis added). The Collaboration Act does not reference the seat of tribal government, major governmental presence, or population centers.

Moreover, the NIGC memorandum preceded BIA's formal recognition of the Fort Sill Apache Indian Reservation in New Mexico. The NIGC memorandum was limited to whether Fort Sill could engage in gaming on its New Mexico land. By contrast, the BIA's 2011 decision proclaiming that the Fort Sill Apache Indian

Reservation is in New Mexico, 76 Fed. Reg. 72969 (2011), explicitly locates the Tribe’s Reservation in New Mexico. It is this decision, not a memorandum dealing with whether gaming could occur on land acquired in trust after October 17, 1988, that controls for the purposes of the State-Tribal Collaboration Act.

Although the majority of the Tribe’s population is in Oklahoma, it is undisputed that the Tribe has a presence in New Mexico and that its Reservation is in New Mexico. The Tribe is therefore at least partially located in New Mexico.

B. The List of Recognized Tribal Entities Does Not Control.

Respondents’ reliance on the Federal Register list of recognized tribes for location purposes is also not warranted. It is a list of “Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services from the United State Bureau of Indian Affairs,” 78 Fed. Reg. 26385, and not a document that purports to rehearse the exclusive locations of recognized tribal entities. For many of the entities, it does not provide any State at all. *See id.* at 26385–86 (listing, *inter alia*, the Cayuga Nation, the Cherokee Nation, the Chickasaw Nation, the Puyallup Tribe of the Puyallup Reservation, the Shawnee Tribe). For others, it only lists one State even where a Tribe is located in multiple States. *Compare id.* at 26388 (listing the “Zuni Tribe of the Zuni Reservation, New Mexico) with 71 Fed. Reg. 75981 (“In 1984, the United States established a reservation for the Zuni Indian Tribe (Tribe) in northern Arizona, the Zuni Heaven Reservation, for

longstanding religious and sustenance activities.”). By contrast, the recognition by BIA of the Fort Sill Apache Indian Reservation in New Mexico deals explicitly with location; it even contains a property description.

Respondents admit that the Tribe has trust land in New Mexico, Resp. at 2, and that it runs a business on that land. *Id.* at 3. As discussed above, the 30 acre parcel in Luna County comprises the totality of the Fort Sill Apache Reservation. The Tribe is located at least partially in New Mexico.

III. THE RELIEF SOUGHT UNDER THE STATUTE HAS NOTHING TO DO WITH THE TRIBE’S DESIRE TO ENGAGE IN GAMING AS A MEANS OF FINANCING DEVELOPMENT ON ITS RESERVATION.

This petition has nothing to do with Petitioner’s desire to engage in gaming on its reservation, as Respondents assume. This case is not about gaming; it is about recognition. While the Tribe may later seek to commence gaming operations on its Reservation, this case is about the recognition by the Respondents of the Tribe, as the State-Tribal Collaboration Act requires—nothing more. The propriety of gaming on Indian land is governed by separate statutes and regulations, both state and federal.

That Respondents raise the gaming issue at the beginning of their Response to the Petition may go some way to explain why they refuse to comply with the State-Tribal Collaboration Act’s mandate as to Petitioners despite recognizing other Tribes based wholly or partially in New Mexico. *See* Att. X to Pet. (email

from Respondent Allison to officials with various tribes and pueblos regarding the 2013 State-Tribal Summit). The Act, however, has nothing to do with gaming. The Act is about fostering positive relationships between and among the State and the Tribes and Pueblos located—wholly or partially—with in New Mexico.

IV. THIS COURT SHOULD ACCEPT JURISDICTION OVER THIS DISPUTE BETWEEN STATE OFFICERS AND ONE OF NEW MEXICO'S SOVEREIGN TRIBES.

This case presents a fundamental constitutional question of great public importance. As set forth in the Petition, the Respondents' refusal to comply with the terms of the Act goes to the heart of important intergovernmental relations between the State and Native Americans in New Mexico. New Mexico has a "unique and venerable tradition of deferring to a 'tribal government's exercise of the sovereign power vested in them.'" *State v. Harrison*, 2010-NMSC-038, ¶ 27, 148 N.M. 500, 509, 238 P.3d 869 (quoting *Benally v. Marcum*, 1976-NMSC-054, 89 N.M. 463, 553 P.2d 1270). In *Harrison*, this Court recognized that New Mexico courts are more deferential to tribal sovereignty than the federal government. 2010-NMSC-038, ¶ 27. New Mexico's "tradition of cooperation and comity between state and tribal governments," *see Harrison*, ¶ 29, is fundamental to the State's identity.

Respondents try to minimize the relief sought by focusing only on two concrete pieces of relief required under the Act: the inclusion in the tribal summit

and the addition of the Tribe to the list of tribal contacts. But these are just two concrete manifestations of the relief sought, which is to “ensure that State agencies under [Respondents’] direction and control collaborate with and otherwise include the tribe in all interactions between and all benefits exchanged between the State and its tribes and pueblos as is required by the Act and other applicable law.” Pet. at 25. In other words, Petitioners ask the Court to require Respondents to recognize the Tribe, as required by state law. The relationship between the State of New Mexico and the Tribes and Pueblos distinguishes New Mexico constitutionally, not just culturally from the rest of the Union. *See id.* It is this cooperation and comity that Petitioners seek.

The duties the Act places on Respondents are ministerial. A state agency “*shall* make a reasonable effort to collaborate with Indian nations, tribes or pueblos in the development and implementation of policies, agreements and programs of the state agency that directly affect American Indians or Alaska Natives.” NMSA 1978, § 11-18-3(C) (emphasis added). Respondents, in failing to recognize the Fort Sill Apache Tribe as a Tribe located wholly or partially in New Mexico, have failed to perform this duty.

Respondents’ argument that there are factual disputes fails. The facts are not in dispute. The question before the Court is the legal effect of those facts. *See Collado v. MVD*, 2005-NMCA-056, ¶ 9, 137 N.M. 442, 445, 112 P.3d 303 (noting

that MVD did not dispute facts, but only the legal effect of those facts). Even Respondents' argument that the federal Government treats the Tribe as an Oklahoma Tribe is premised not on a denial, but on the refusal to acknowledge the federal Government's declaration of the Tribe's Reservation in New Mexico. Respondents also do not dispute that the New Mexico Secretary of State, in the "Blue Book," recognizes the Tribe as a New Mexico Tribe.

Respondents argue that a plain, speedy, and adequate remedy at law exists for Petitioners via declaratory judgment. Resp. at 11–12. But declaratory judgment "does not constitute an adequate remedy at law that would preclude mandamus relief." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 26, 149 N.M. 330, 338 (citing *City of Albuquerque v. Ryon*, 1987-NMSC-121, 106 N.M. 600, 747 P.2d 246). Respondents identify no plain, speedy, and adequate remedy at law available to Petitioners, because there is none.

Moreover, Respondents argue that no expeditious resolution is necessary. But the 2014 summit is approaching quickly—more quickly than a district court will likely be able to resolve the matter. For the 2013 summit, preparations began as early as February 7, 2013. *See* Att. U to Pet. (soliciting proposals for hosting). On February 28, 2013, Respondent Allison sent a survey seeking input into topics and issues to be discussed during the 2013 summit; the survey was to be returned no later than March 29, 2013. Att. V. to Pet. If Petitioners are to fully participate

in the 2014 summit, and otherwise gain the benefits mandated by the Act, an expeditious resolution of this dispute is necessary.

Respectfully submitted,

PEIFER, HANSON & MULLINS, P.A.

By:



Charles R. Peifer

Matthew R. Hoyt

Matthew E. Jackson

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*Attorneys for Petitioner Fort Sill Apache
Tribe and the Honorable Jeff Haozous,
Chairman of the Fort Sill Apache Tribe*

We hereby certify that a copy of the foregoing Reply was served by first-class mail and electronic mail to:

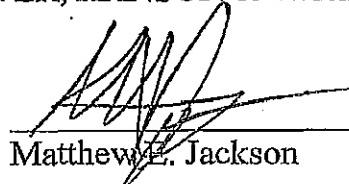
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Workers' compensation exemption arbitrary, court rules

By Matthew E. Jackson / Peifer, Hause & Mullins, P.A.

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In a June 22 decision, the New Mexico Court of Appeals ruled that an exception to the state's workers' compensation laws that did not require employers to provide coverage for farm and ranch workers was unconstitutional. The decision has drawn criticism from the agricultural industry and praise from organizations that advocate for the poor and for workers' rights, but its ultimate effect on New Mexico's agricultural businesses and workers remains to be seen.

Workers' compensation laws were developed as a tradeoff to provide both employers and employees with certainty and reduced costs. Employees get the benefit of quick, certain coverage of their medical costs and lost wages for injuries suffered at work, but they give up the right to sue their employers for negligence. Employers, conversely, bear the burden of compensating injured workers, but they no longer face the cost and expense of litigation in negligence suits filed by employers.

New Mexico's first workers' compensation statute, enacted in 1917, only covered "extra-hazardous" occupations, such as mining, lumber or working in a brewery (!) or factory. In 1937, the Legislature expressly excluded farm and ranch laborer from workers' compensation. In 1975, however, the Legislature expanded the law to include all occupations except those that it specifically excluded. Currently, the statute excepts "private domestic servants and farm and ranch laborers" from coverage.

In 2009, three injured workers and two advocacy groups sued the Workers' Compensation Administration in district court, arguing that the farm and ranch laborer exception was unconstitutional. District Judge Valerie Huling agreed, holding that the exception violated the workers' right to equal protection under the law. The administration appealed, but did not challenge, Judge Huling's ruling on the unconstitutionality of the exception. The appeal dealt with whether the injured workers should have been in district court in the first place, rather than appealing the administration's decision directly to the Court of Appeals. In an unpublished decision, the Court of Appeals dismissed the appeal as moot because the injured workers had since settled their claims with the Administration.

In the case just decided, called Rodriguez v. Brand West Dairy, two injured agricultural workers – a chile picker and a dairy herdsman – tried to rely on Judge Huling's ruling in the earlier case, but workers' compensation judges nevertheless denied their claims, based on the farm and ranch laborer exception. The workers appealed, and the Court of Appeals held, as Judge Huling had in the previous case, that the exception is unconstitutional.

Equal protection lawsuits are based on disparate treatment of similarly situated persons. In this case, because workers' compensation is not a fundamental right like free speech or free exercise of religion, and because the exception for farm and ranch laborers did not draw a sensitive or suspect classification like race, the court applied the most relaxed level of scrutiny, under which the statute would be upheld as long as it was rationally related to a legitimate governmental purpose.

The court held that, even under this deferential review, the exception could not survive – the exception was arbitrary on its face. For example, not all workers on a farm or ranch fall within the exception, only those whose primary role was cultivating crops or livestock were excepted, while those who processed crops must be covered. So, while an employer would not have to provide coverage for a chile picker, the same employer would have to provide coverage for a worker who sorted, packed or shipped the chile after it had been picked. The employers argued that there was a legitimate interest in simplifying the administration of the workers' compensation system and protecting the industry from overhead, but the court held that this did not justify the arbitrary classification created by the exclusion.

This is a significant change in the law affecting agricultural businesses. Recognizing this, the court ruled that its decision would be given "modified prospective application." Normally, a court's holding applies "retroactively," that is, to any case that was still pending or on appeal, as well as any claim that could still be brought, at the time of the court's decision. But in this case, the court ruled that its decision would apply only to claims that were brought after, or pending on, March 30, 2012, the date of Judge Huling's ruling in the previous case. The court reasoned that Judge Huling's decision gave the Workers' Compensation Administration notice that the law was unconstitutional.

Only time will tell how much of an effect the expansion of workers' compensation to farm and ranch workers will have on New Mexico's agricultural industry. One potential issue is that farms and ranches may face workers' compensation claims for injuries suffered between 2012 and the present, a period for which they may not have had workers' compensation insurance. In the longer term, the impact may or may not be significant.

Looking to our neighboring states does not provide many clues. Arizona and Colorado do not have any exception for farm laborers, and Oklahoma requires large agricultural employers (more than \$100,000 in previous year's gross payroll for agricultural workers) to provide workers' compensation. In Texas, employers in any industry may choose to provide coverage

or not. Each of these states has a robust agricultural industry, so workers' compensation may be a minor factor when compared with, say, adequate rain.

The expanded coverage will undoubtedly impose additional costs on farms and ranches, many of which operate on thin margins, but Judge Huling noted that many farms already bear these costs – 29 percent of New Mexico farm and ranch employers already voluntarily provide workers' compensation coverage for their workers. On the other hand, this is a victory for farm workers, who will now be able to obtain compensation for work-related injuries, but if farms are not able to employ as many workers as a result of increased costs, some workers will lose out.

The employers may still ask the New Mexico Supreme Court to review the court's decision. If they do, the Supreme Court may or may not choose to hear the case.

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